STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2005
v	No. 257259 Genesee Circuit Court
DAVID EDWARD LINDENSMITH, Defendant-Appellant.	LC No. 03-013125-FC

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to one count of first-degree criminal sexual conduct (CSC), MCL 750.520(1)(a), and was sentenced to ten to thirty years' imprisonment. He appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion by denying his motion to withdraw his plea where he pleaded nolo contendere to a count in the information that described "digital/penial (sic)" penetration. Defendant maintains that this description does not refer to an act of sexual penetration. Pursuant to MCR 6.310(B), if an alleged error does not pertain to the plea-taking procedure, a defendant must show a fair and just reason to withdraw the plea. *People v Patmore*, 264 Mich App 139, 149; 693 NW2d 385 (2004); *People v Wilhite*, 240 Mich App 587, 594; 618 NW2d 386 (2000).

Here, after the preliminary examination, defendant pleaded nolo contendere pursuant to a plea agreement whereby Count I of the information was amended to apply to both victims named in the original six-count information. All six counts charged defendant with first-degree CSC for engaging in sexual penetration with a person under the age of thirteen years, MCL 750.520(1)(a), and identified the possible sentence as life or any term of years, but contained various descriptions of the nature of the sexual penetration, including "digital/penial (sic)," "oral/vaginal," "oral/penial (sic)," and "digital/vaginal."

Sexual penetration is defined as meaning "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(o). The intrusion means of penetration may be accomplished by an inward force of a defendant's finger into the victim's vagina, *People v Hammons*, 210 Mich App 554, 557-558; 534 NW2d 183 (1995), referred to as digital penetration, which is distinguished

from penile-vaginal penetration. See *People v Matuszak*, 263 Mich App 42, 60; 687 NW2d 342 (2004).

The information is presumed to be framed with reference to facts disclosed at a preliminary examination. *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). At the preliminary examination, the older victim testified regarding multiple acts of sexual penetration by defendant against both herself and her sister over a number of years. The acts included digital penetration, cunnilingus, and fellatio. At the plea hearing, the trial court relied on a police report to establish a factual basis for defendant's plea. The report contained statements by both victims describing different types of sexual penetration committed by defendant, including defendant's conduct of inserting his finger into their vaginas.

We find no deficiency in the plea-taking procedure because a sufficient factual basis existed for the trial court to find first-degree CSC. See MCR 6.302(D)(3), see, also, *Patmore*, *supra* at 151 n 4, citing *People v Booth*, 414 Mich 343, 360; 324 NW2d 741 (1982). Had defendant timely challenged the description of the act of sexual penetration in the information, the prosecutor could have remedied any perceived ambiguity by amending it to conform to the evidence at the preliminary examination, as well as the plea hearing, indicating that each victim was digitally penetrated. A trial court has discretion to allow an amendment unless it would unduly surprise or prejudice the defendant. MCR 7.67.76 and MCR 6.112(H); see, also, *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). Because defendant failed to show the requisite prejudice or surprise, and because the evidence presented at the plea hearing sufficiently established that defendant digitally penetrated both victims, defendant failed to establish a fair and just reason for withdrawing his plea to first-degree CSC. Therefore, the trial court did not abuse its discretion in denying defendant's motion on this ground.

Defendant raises three issues in a supplemental appeal brief. First, he argues that the trial court violated his plea agreement with the prosecutor and rendered it illusory by scoring fifty points for offense variable (OV) 12 of the judicial sentencing guidelines. Defendant waived this issue by not moving to withdraw his plea on this specific ground below. MCR 6.311(C). Defendant's argument at sentencing concerning how OV 12 should be scored was insufficient to preserve the separate issue whether defendant should be allowed to withdraw his plea. Cf. *People v Nowicki*, 213 Mich App 383, 385; 539 NW2d 590 (1995). Even if we treated this issue as a forfeited issue subject to review under the plain error rule of *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), we would not reverse.

There is no record support for defendant's claim that the trial court violated the plea agreement, and defendant's claim that his plea was illusory is without merit. There are real differences between sentencing prospects for a defendant convicted of a single count of first-degree CSC, compared to a defendant convicted of six counts of first-degree CSC, who is also subject to enhanced sentencing as an habitual offender, second offense, pursuant to MCL 769.10. See *People v Harris*, 224 Mich App 130, 134; 568 NW2d 149 (1997). Even if multiple convictions would not lead to increased sentence length because of the effects of concurrent sentencing, they may punish a defendant in other ways, such as adversely affecting parole consideration. See *People v Graves*, 207 Mich App 217, 220 n 4; 523 NW2d 876 (1994); *People v Peete*, 102 Mich App 34, 38-39; 301 NW2d 53 (1980). Further, the consideration for a plea bargain is not dispositive of whether a plea will be set aside. Where facts indicate that a plea is

voluntary, the plea will be upheld. *People v Mrozek*, 147 Mich App 304, 306-307; 382 NW2d 774 (1985). Here, the record discloses that defendant's plea was voluntary.

Next, relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant seeks resentencing on the ground that he was denied his right to have a jury decide the facts used to score the offense variables. Because defendant did not raise this issue in the trial court, we review it for plain error affecting defendant's substantial rights. *Carines*, *supra*; see, also, *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Defendant's reliance on the legislative sentencing guidelines is misplaced, because the judicial sentencing guidelines apply to felonies committed before January 1, 1999. MCR 769.34(1). Additionally, the judicial guidelines do not have the force of law. *People v Raby*, 456 Mich 487, 497; 572 NW2d 644 (1998). In any event, Michigan's indeterminate sentencing scheme is unaffected by *Blakely*, *supra*. See *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). For these reasons, defendant has not established a plain sentencing error.

Finally, defendant argues that he was denied the effective assistance of counsel. We disagree.

It is incumbent on a defendant to establish the factual predicate for his claim of ineffective assistance of counsel. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). If a *Ginther*[1] hearing is not held in the trial court, an appellate court's review of relevant facts is limited to mistakes apparent from the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Defendant must establish both that defense counsel's performance fell below an objective standard of reasonableness and prejudice, which means a reasonable probability that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

We are not persuaded that remand for a *Ginther* hearing is warranted. It is clear from the record that defendant was allowed an opportunity for a *Ginther* hearing below, but refused to waive his attorney-client privilege so that the attorney who represented him at the plea hearing could testify about sentencing and other advice that was provided with respect to defendant's plea. Also, the trial court did not err in rejecting defendant's subsequent offer, when raising new claims of ineffective assistance of counsel at sentencing, to have only his other former attorney testify at a *Ginther* hearing. When a claim of ineffective assistance of counsel arises in the context of a plea, the relevant inquiry is whether the defendant tendered the plea voluntarily and understandingly. *People v Bordash*, 208 Mich App 1, 2; 527 NW2d 17 (1994); see, also, *People v Thew*, 201 Mich App 78, 91; 506 NW2d 547 (1993). Because the record indicates that both of defendant's former attorneys played roles in defendant's decision to tender a nolo contendere plea, defendant's offer would have left the trial court with an insufficient factual basis for evaluating his claim of ineffective assistance of counsel.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Limiting our review to the record, defendant has not met his burden of establishing ineffective assistance of counsel. To the extent that defendant challenges his former attorney's performance relative to the preliminary examination and motion to suppress his statements, those claims did not survive defendant's nolo contendere plea. Issues relating solely to the state's capacity to prove factual guilt are waived by a guilty plea. *People v New*, 427 Mich 482, 493; 398 NW2d 358 (1986); *Bordash*, *supra* at 2. When the alleged deficient performance of counsel relates to a waived issue, the claim of ineffective assistance of counsel is also waived. *Id*. at 2-3. To the extent that defendant's claims relate to the adequacy of his former attorneys' performance relative to his plea or sentence, the facts of record do not support a claim of ineffective assistance of counsel. Neither reversal of defendant's conviction, nor resentencing, is warranted.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra